MBF FINANCE BHD.

v.

MALAYSIA AIR CHARTER CO. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 23-1252-86]
28 NOVEMBER 1986

CIVIL PROCEDURE: *Interest on judgment debt - Interest rate payable from date of judgment - Debt - Distinction between "debt" and "judgment debt" - Rate of interest - Jurisdiction - Interest awarded on judgment debt higher than statutory rate - Whether Court has jurisdiction - Rate of interest agreed by parties - Effect of agreement on judgment debt.*

The plaintiffs' claim was for arrears of rental arising out of an equipment lease agreement and interest due thereon. The agreed rate of interest on late and overdue payments of rental until full payment was 2% per month.

On 17 June 1986 judgment in default of defence was entered against each of the defendants for the arrears of rental claimed as well as interest claimed up to date of judgment and thereafter until realisation at 2% per month.

The defendants applied to have the default judgment set aside. The learned Judge had set aside the judgment and on application he agreed to and heard further arguments in open Court.

Having had given an explanation for not filing the defence the defendants' solicitor contended the interest award at 2% per month on the judgment sum calculated until realisation runs foul of O. 42 r. 12 of the Rules of the High Court 1980 as the rules prescribe a maximum rate of interest on judgment debts at 8% per annum.

Held:

[1] The application to set aside the default judgment was allowed as the Court had no jurisdiction to award interest on the judgment debt at a rate higher than 8% per annum.

[2] There is nothing either in the provisions of the various statutes and rules that were referred to the learned Judge, in s. 16(i) of the Courts of Judicature Act or elsewhere, that supports the invitation by counsel for the plaintiffs not to apply the literal or golden rule of construction to O. 42 r. 12.

[3] Accordingly, following the written judgment he had delivered earlier in *Public Bank v. Hara Industries Sdn. Bhd. & Anor.,* the learned Judge continued to hold the opinion that the Courts are not entitled to award interest on judgment debts at a rate higher than 8% per annum even in cases where the parties have agreed otherwise.

[4] The order made in Chambers setting aside the default judgment will not be disturbed.

[Plaintiffs to pay costs of and incidental to further arguments in Open Court.]

Cases referred to:

Public Bank v. Hara Industries Sdn. Bhd. & Anor. [1987] CLJ (Rep) 842
London Chatham and Dover Rly. Case [1893] AC 429
President of India v. La Pintada Compania Navigation S.A. [1985] 1 AC 104
S.S. Hontestroom v. S.S.Saga-Porack etc. [1927] AC 37

Donald Campbell v. Pollock [1927] All ER 1; [1927] AC 732
Re Sneyd, ex parte Fewings 25 Ch D 338
London Borough of Ealing v. El Isaac & Anor. [1980] 1 All ER 548
Sim Lim Finance Ltd. v. Pelandok Enterprises Pte.Ltd. & Anor. [1981] 1 MLJ 280
Att-Gen. v. Mutual Tontine Westminster Chambers Ass. Ltd. [1876] 1 Ex D 469
Capper v. Baldwin [1965] 2 QB 53
Tara Singh v. T.M. Banerji & Anor. 7 FMSLR 58

Legislation referred to:
Bills of Exchange Act 1949, s. 57
Civil Law Act 1956, s. 11
Civil Procedure Act 1918 [FMS], s. 207(i)
Courts of Judicature Act 1964, ss. 16(i), 25(2)
Judgments Act 1838 [UK], s. 17
Partnership Act 1961, s. 26(c)
Rules of the High Court 1980, O. 42 r. 12, O. 13 r. 1(2), O. 19 r. 2
Rules of the Supreme Court 1934, O. 34 r. 41, O. 39 r. 13
Rules of the Supreme Court 1957, O. 42 r. 16
Sales of Goods Ordinance 1957, s. 61

Other sources referred to:
Supreme Court Practice, 1982, para. 42/1/8
Maxwell, 12th Edn., p. 196
Mallal's, Supreme Court Practice, 2nd Edn., p. 496

For the plaintiffs - S.C.Loh (William Leong with him); M/s. Joseph Tan & Tang
For the defendants - Megat Nazirudin bin Megat Shamsuddin; M/s. Mutalib & Bakaruddin

[Editor's Note: Plaintiff's appeal to the Supreme Court was dismissed with costs. The judgment of the Supreme Court, on appeal against this decision, is reported in this issue of the CLJ at p. 196.]

JUDGMENT

VC George J:

The plaintiffs' claim was for arrears of rental arising out of an equipment lease agreement. They also claimed interest on late and overdue payments of rental until full payment was effected at the agreed rate of 2% per month.

On 17 June 1986 judgment in default of defence was entered against each of the defendants for the arrears of rental claimed as well as interest claimed up to date of judgment and thereafter until realisation at 2% per month.

The defendants applied to have the default judgment set aside. An affidavit by the solicitor having the conduct of the matter for the defendants was filed in support of the application. An explanation was given for the statement of defence not having been filed. The solicitor went on to state that the defendants dispute the computation of the arrears claimed. The defendants did not condescend to particulars and accordingly it was not possible to see any merits in the complaint. He also contends that interest awarded at 2% per month on the judgment sum calculated until realisation runs foul of O. 42 r. 12 of the Rules of the High Court which, in his submission, prescribes a maximum rate of interest on judgment debts at 8% per annum. This complaint called for further consideration.

When the matter was heard in Chambers I followed the written judgment I had delivered earlier in Kuala Lumpur High Court Civil Suit No. C 7652 of 1985 (*Public Bank v. Hara Industries Sdn.* Bhd. *& Anor*.) and allowed the application to set aside the default judgment

on the ground that the Court had no jurisdiction to award interest on the judgment debt at a rate higher than 8% per annum and that accordingly judgment having been entered for interest on the judgment sum at 24% per annum the defendants were entitled to have the judgment set aside.

However, on application therefor, I agreed to and heard further arguments in open Court presented for the plaintiffs by Encik S.C.Loh and Encik William Leong and by Encik Megat Nazirudin bin Megat Shamsuddin for the defendants.

I would summarise the arguments for the plaintiffs as I understood it as follows:

(i) The Courts have recognised, in awarding interest, that a distinction should be made between contracts where the parties have an agreement in respect of the rate of interest and where they have not.

(ii) Parliament has also recognised this distinction as can be seen in a number of statutes and in Rules of Court and other subsidiary legislation.

(iii) Contractual freedom is a recognised right.

(iv) In the face of the right of contractual freedom and in the face of the recognition of the distinction between contracts to pay interest at a specified rate and where no rate had been agreed O. 42 r. 12 (which prescribes that every judgment debt shall carry interest at a rate not exceeding 8% per annum) should be read to have reference only to contracts in respect of which the parties have not agreed on the rate of interest.

(v) The power to award interest is given to the Courts by item 7 of the Schedule to the Courts of Judicature Act. No limits in respect of the rate of interest are imposed by the Schedule.

(vi) Order 42 r. 12 is subservient to the enabling statutory provision which is s. 16(i) of the Courts of Judicature Act where the 8% limit on interest is specifically stated not to apply where the parties have their own agreement in respect of interest.

As has been noted, Encik Loh had contended that the general source of power given to the Courts to award interest is item 7 of the Schedule to the Courts of Judicature Act. The Schedule is indeed in respect of addition powers of the High Court and item 7 thereof does deal with the power to direct interest to be paid on debts including judgment debts. However, it is not the Schedule but s. 25(2) of the Act that purports to give the High Court the additional powers itemised in the schedule which section has to be read subject to the proviso thereto:

> provided that all such powers (itemised in the Schedule) shall be exercised in accordance with any written law or Rules of Court relating to the same.

Accordingly before purporting to exercise the power to award interest the Court has to look elsewhere to find any written law or rules of Court that in fact gives it the power to do so. Perhaps that is why Encik Loh drew my attention to various provisions and rules each of which appears to have some relevance to the awarding of interest. The provisions and rules with some observations by me in respect of each of them (with reference to the context) are as follows:

(1) Section 11 of the Civil Law Act 1956.

This section gives the Court power to award interest "at such rate as it thinks fit" for the whole or any part of the period between the date the cause of action arose and the date of the judgment. It is to be noted that the discretion given to the Court by s. 11 to award interest is only for the period up to date of judgment. Section 11 has no relevance or application to the post judgment period. It has no relevance or application to judgment debts.

(2) Section 26(c) Partnership Act 1961 which provides that a partner would be entitled to interest on monies advanced by him to the partnership at 8% per annum if the partners had not agreed on interest and presumably if there was agreement in respect of interest, in the terms of such agreement.

(3) Section 61 Sales of Goods Ordinance 1957 which provides for the recovery of interest ..." where by law interest may be recoverable". It also provides that in the absence of contract to the contrary the Court may award interest at such rate as it thinks fit. It would follow that where there is a contractual rate of interest the Court may award interest at that rate.

(4) Section 57 Bills of Exchange Act 1949 which provides that -

Where a bill is dishonoured the measure of damages ... shall be (i) the amount of the bill (ii) interest thereon from the time of presentment.

(5) Order 13 r. (1) of the Rules of the High Court (RHC) which default of appearance where the claim is a liquidated demand. Sub-rule(2) is as follows:

(2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason only that part of the claim is for interest accruing after the date of the writ at an unspecified rate, but any such interest shall be computed from the date of the writ to the date of entering judgment at the rate of 8 per cent.

(6) Order 19 r. 2 RHC has similar provisions in respect of a claim for a liquidated demand where there has been default of defence and there is a claim for interest at an unspecified rate accruing after the date of the writ.

No doubt the above list given by Encik Loh is not exhaustive and there must be other provisions is statutes or in rules or other subsidiary legislation dealing with the right of interest and the rate at which such interest should be computed.

Encik Loh pointed out and I agree with his submission, that each of those provisions recognises that parties may have an agreement in respect of the payment of interest and the rate at which it is payable and that such contractual right to payment of interest is recognised and preserved by those provisions.

He went on to re-emphasise that s. 16(i) of the Courts of Judicature Act also made a distinction between the situation where the parties have an agreement in respect of interest and where they do not.

The submission following on all this appeared to be that it could not have been the intention of Parliament to interfere with any agreement arrived at between parties in respect of interest. It was urged upon the Court that O. 42 r. 12 RHC should be read without applying the literal construction rule and should be read to refer only to cases where the parties have no agreement in respect of the payment of interest. It was submitted that where there is agreement in respect of the payment of interest, the Courts should award interest not only up to judgment at the agreed rate but on the judgment debt as well at the agreed rate until full realisation is effected.

Another look at those diverse provisions of the law in respect of the right to interest that had been referred to here above shows that where the parties have an agreement in respect of the payment of interest an award may be made at that rate but, while in some of the provisions the date from which interest has to be or could be computed is indicated the length of the period for which interest is to be computed is not specified except by s. 11 of the Civil Law Act and the two rules of Court in each of which provisions it is specified that interest may be awarded but only up to the date of judgment! In particular it is to be noted that none of those provisions including the wide provisions of s. 11 of the Civil Law Act provided for awarding interest on judgment debts.

The distinction between there being an agreement for the payment of interest at an agreed rate and there being no such agreement has always been recognised by the Courts. I have shown this to be the position in the *Public Bank case*. But such distinction is relevant only up to date of judgment. Thereafter the contractual arrangement is not relevant. This is because the right to interest upon a judgment debt is a statutory right. That was the position in England and that is the position here. At common law there never was a right to interest on judgment debts *(London Chatham and Dover Rly. Case* [1893] AC429 Also see *President of India v. La Pintada Compania Navigation S.A.* [1985] 1 AC 104 where the rule in *London Chatham* was reaffirmed).

In England the statutory provision is found in s. 17 of the Judgments Act 1838. Originally the rate of interest was 4% per annum. But the rate has been increased from time to time by rules or orders made for that purpose (see the Supreme Court Practice 1982 para 42/1/8). In Malaysia the equipolent provision is O. 42 r. 12 which, although it is only subsidiary legislation, being procedural, has the force of a statute *(S.S.Hontestroom v.S.S. Saga-Porack etc.* [1927] AC 37, 47; *Donald Campbell v. Pollock* [1927] All ER 1; [1927] AC 732,). The enabling statute under which the Rule was made, as has been noted earlier herein, is s. 16(i) of the Courts of Judicature Act:

> 16. Rules of Court may be made for the following purposes ...
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> (i) for regulating the rate of interest payable on all debts including judgment debts ... provided that in no case shall any rate of interest exceed 8 per cent per annum unless it has been otherwise agreed between the parties ...

Section 16(i) does not give any power to the Courts. What it does is to empower the Rules Committee to make rules to regulate the manner in which the Courts should exercise the discretion they have to award interest. The Rules Committee were allowed to make rules within the ambit of the powers given to them by s. 16(i). However, the only existing rule that the Rules Committee made pursuant to s. 16(i) is O. 42 r. 12 which has relevance only to the period after judgment has been entered:

> 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

There is no rule regulating the rate of interest in respect of the period prior to judgment being entered. In the *Public Bank case* I had surmised that the reason for this may be the existence of the specific statutory provision, s. 11 of the Civil Law Act, which gives the Court wide discretionary powers to award interest up to the date of judgment. While proviso (b) to s. 11 appears to take away the power given to the Courts by s. 11 in respect of debt upon which interest is payable as of right whether by virtue of any agreement or e.g. by some statutory provisions I had pointed out in the *Public Bank case* that the Courts have in fact always awarded interest at the rate agreed to by the parties (unless in the peculiar

circumstances of the case there were other statutory prohibitions from doing so e.g. the Moneylending Act) but only up to the date of judgment. This the Courts have always done on the basis, in my judgment, of the recognition the Courts have always given to the parties right of freedom in and to contract.

The short answer to the arguments put forward on behalf of the plaintiffs is provided by the doctrine of merger. This doctrine is derived from the decision of the English Court of Appeal in *Re Sneyd, ex parte Fewings* 25 Ch D 338. In that case there was a mortgage deed in which was a covenant to pay interest at 5% on the principal sum or any part of it that remained unpaid. The mortgagee recovered judgment for the principal sum and arrears of interest. However, it was held that the covenant being merged in the judgment, as from the date of judgment the mortgagee judgment creditor was only entitled to interest at the statutory rate of 4% Lindley LJ said at 353:

> Now it may be technical, but it is well settled, that, if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant, ,merges in the judgment debt. In point of law the £2200 is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest is gone, and the judgment debt bears interest only at 4 per cent.
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> It is said that the effect of this will be to vary the contract between the parties. I think it may vary the contract, but it must be borne in mind that the creditor who obtains a judgment for principal and interest gets compound interest; his judgment carries interest at 4 per cent upon the arrears of interest, as well as upon the principal.

The doctrine of merger was discussed by the English Court of Appeal in the more recent case of *London Borough of Ealing v. El Isaac & Anor.* [1980] 1 All ER 548 where *inter alia Re Sneyd, ex parte Fewings* was considered. The leading judgment was read by Templeman LJ Although he was of the opinion that in this day and age the wide effect given to the merger doctrine should be considerably narrowed down he went on to hold that on principle and on the authorities the doctrine continued to obtain in the case of contracts and covenants.

In Singapore where in 1981, the provisions of the law pertaining to the award of interest were identical to the Malaysian provisions, the opinion of the Registrar of the Supreme Court Mr. R.E.Martin that the Courts had no jurisdiction to award a higher rate of interest than 8% per annum on judgment debts even if the parties had agreed to a higher rate was upheld by Wee Chong Jin CJ *(Sim Lim Finance Ltd. v. Pelandok Enterprises Pte. Ltd. & Anor.* [1981] 1 MLJ 280 (**N.B.** - Mr. R.E. Martin's grounds of decision are reproduced as an appendix to the report of the learned Chief Justice's judgment. Inadvertently the reference to that judgment and to the grounds of decision were omitted from the *Public Bank* judgment).

Now the literal construction principle of interpretation of statutes is the first and elementary rule of construction. The effect of the rule is that if there is nothing to modify, after or qualify the language which the statute contains it must be construed in the ordinary and natural meaning of the words and sentences (see *Att-Gen. v. Mutual Tontine Westminster Chambers Ass. Ltd.* [1876] 1 Exh D 469 per Jessel MR). The object of all interpretation is to discover the intention of Parliament but as Lord Parker CJ said (in *Capper v. Baldwin* [1965] 2 QB 53) "the intention of parliament must be deduced from the language used." Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise, says the author of *Maxwell* (12th Edn. p. 29).

The judgment of the Court of Appeal in the 1929 Perak case - *Tara Singh v. T.M. Banerji & Anor.* (FMSLR 58) was referred by Counsel for the plaintiffs in support of his cause. In that case s. 207(i) of the Civil Procedure Act 1918 was referred to which restricted interest on all

judgment debts to 8% per annum. However, Elphinstone CJ held that that section only applied to cases where there had been a trial of the action but as in the case before the Court summary judgment had been entered it was s. 471 that applied pursuant to which the judgment sum would carry no interest at all! s. 207(i) is in *pari materia* with the present O. 42 r. 12 RHC and if anything the judgments read in that case support the literal reading of O. 42 r. 12.

The learned author of Mallal's *Supreme Court Practice* 2nd Edn. (p. 496) points out that the rule and its predecessors O. 34 r. 41 and O. 39 r. 13 of the Rules of Supreme Court 1934 and O. 42 r. 16 of the Rules of Supreme Court 1957 are local. The rules read as follows:

> O. 34 r. 41: The Court shall, on the trial of any action in which interest is recoverable or on the hearing of any application for judgment in such action, give judgment for interest at the rate, if any, agreed upon between the parties, and, if no rate has been agreed upon at such rate, not exceeding six per centum per annum, as the Court or Judge thinks fit.
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> O. 39 r. 13: Unless it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of six per centum per annum or at such other rate not exceeding the rate aforesaid as the Court or a Judge directs, such interest to be calculated from the date of judgment until the judgment is satisfied.
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> O. 42 r. 16: Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of six percent per annum, from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than six per cent interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed.

What has irresistably to be noted is that while those 1934 and 1957 rules provided that in awarding interest, where there was an agreed rate, interest would be ordered at that rate both for the pre-judgment as well as for the post-judgment period, in the successor to those rules which is O. 42 r. 12 RHC 1980 the express distinction made in the 1934 and 1957 rules between the position where there was an agreed rate of interest and where there was no such agreement has been omitted. The equally irresistable conclusion to arrive at is that it was the Rules Committee's obvious intention in providing O. 42 r. 12 to provide that there be no distinction in interest rates on judgment debts.

There is nothing either in the provisions of the various statutes and rules that were referred to me, in s. 16(i) of the Courts of Judicature Act or elsewhere, that supports the invitation by Counsel for the plaintiffs not to apply the literal or golden rule of construction to O. 42 r. 12.

Accordingly I continue to hold the opinion that the Courts are not entitled to award interest on judgment debts at a rate higher than 8% per annum even in cases where the parties have agreed otherwise.

The order made in chambers setting aside the default judgment will not be disturbed.

The plaintiffs will pay the costs of and incidental to the further arguments in open Court.

Also found at [1987] 2 CLJ 322